COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT NO.: 2017-P-1167

MARY SHIEL,
APPELLANT

v.

KELI JO ROWELL and
JOHN ROWELL,
APPELLEES

ON APPEAL FROM JUDGMENT OF THE SOUTHERN DISTRICT OF THE APPELLATE DIVISION
DOCKET NO: 17-ADCV-4SO

# BRIEF OF THE APPELLANT

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## STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

Appellant Mary Shiel ("Shiel") filed a Complaint against the Appellees Keli Jo and John Rowell ("Rowells") on July 15, 2015 alleging claims for private nuisance and trespass against the Rowells. (App.5). Specifically that an almost 100 foot tall tree on the parties property line had long branches extending over the Plaintiff's property and that the leaves and tree were causing damage to the Plaintiff's home. (App. 5)

On September 18, 2015, the Rowells filed their answer. (App.9).

On October 12, 2016, over a year later, the Rowells filed a Motion to Dismiss Shiel's Complaint. (App.17).

On November 22, 2016 Quincy District Court allowed the Rowells' Motion to Dismiss. (App.131). The District Court said that Pontes v DaSilva 380 Mass 1008 (1983) precluded this cause of action and that a lower court is bound by the rulings of the Supreme Judicial Court and that the law as set forth in Pontes can be changed only by the Supreme Judicial Court. The District Court did not address the other arguments advanced by the Defendants in their Motion to Dismiss.

On December 7, 2016, Shiel filed a Notice of Appeal of the lower Court's judgment with the Appellate Division of the District Court Department Southern District. On April 14, 2017 a hearing was held on the motion. On August 9, 2017, the Appeals Court issued its judgment affirming the ruling by the lower court and declined to fell judicial precedent. The Court stated that it is the province of the Legislature or the Supreme Judicial Court to change any decision by the

Supreme Judicial Court. (App.133)

## B. STATEMENT OF RELEVANT FACTS

Mary Shiel and Keli Jo and John Rowell are next door neighbors in Randolph, MA. (App.17). The two families have a long history of living next to one another. (App.18). Shiel has lived in her home for 39-plus years, while John Rowell has lived in the neighborhood for a similar amount of time. The parties have been neighbors for approximately 12 years. For a long time the parties were friendly. (App.18).

In 2010, Shiel's property, including but not limited to her house, were damaged by overhanging branches from a large tree located on the Rowells' property. (App.18). Shiel asked that the tree be cut down to prohibit the damage that was occurring to her house.[1] (App.18). When the Rowells did not cut the tree down, Shiel filed a small claim action against them in Quincy District in September 2014. The Court

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[1] It was mentioned during litigation that Shiel could invoke the "self help" rule available in Massachusetts: (see: (Michalson v. Nutting, 175 N.E. 490 (Mass. 1931)) and cut any branches overhanging her property. However the tree is so tall that she feared that if she cut the branches overhanging her property the tree would become unbalanced and fall. Given its size damage to property and/or life could be serious.

issued a judgment for the Rowells in the matter. (App.18).

On or about July 15, 2015 Shiel filed a separate action in Quincy District Court. (App.19). Shiel claimed that since the first action was heard, there has been additional and wholly separate damage to her property as a result of the Rowells failure to cut their tree down. (App.19).

The Rowells filed a Motion to Dismiss on or about October 12, 2016 alleging that Shiel's claims must be dismissed on the grounds that the Small Claims Judgment was res judicata, that Shiel's nuisance and trespass claims are not actionable under Ponte v. Dasilva, 388 Mass. 1008 (1983), and because the District Court lacked equity jurisdiction, as there was no actionable claim for money damages. (App.22-23) After a October 19, 2016 hearing on the Rowells' Motion to Dismiss, the Court issued a judgment, granting the Rowells' Motion to Dismiss on the grounds that Shiel's nuisance and trespass claims are not actionable under Ponte v. Dasilva, 388 Mass. 1008 (1983)and that the District Court was bound by that Supreme Judicial Court ruling. The other grounds advanced by the Defendants in their

Motion to Dismiss were not addressed. (App. 131).

## SUMMARY OF ARGUMENT

Should the "Massachusetts Rule", Ponte v. Desilva, 388 Mass. 1008 (1983), that holds that the failure of a landowner to prevent the blowing or dropping of leaves, branches, and sap from a healthy tree onto a neighbor's property is not unreasonable and cannot be the basis of a finding of negligence or private nuisance be overturned in light of developments in case law across the country where courts in other states have considered and explicitly rejected the Massachusetts rule as outdated, unrealistic and unfair?

## STANDARD OF REVIEW

The standard of review for a motion to dismiss pursuant to Mass.R.Civ.P. Rule 12(b)(6) is set forth in Joseph Iannacchino v. Ford Motor Company, 451 Mass. 623, 888 N.E.2d 879 (2008), abrogating the long standing application and analysis of Nader v. Citron, 372 Mass. 96 (1977), quoting Conley v. Gibson, 355 U.S. 41 (1957. The standard to be applied is that adopted by the United States Supreme Court in Bell Atlantic

Corporatoin v. William Twombly, 127 S.Ct. 1955. 167 L.Ed.2d 929 (2007).

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations [citation omitted], a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235-236 (3d ed. 2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more...than...a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), [footnote omitted] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) [citations omitted].

Id. at 1964-1965; see Iannacchino, *supra*., at 635-636, 889-890.

At the pleading stage, the threshold requirement of Fed.R.Civ.P. Rule 8(a)(2) is that the plain statements presented possess enough heft to show that the pleader is entitled to relief. Id. at 1966; see Iannacchino, *supra*., at 636, 890.

> "So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money

by the parties and the court." Id. (citations omitted).

## ARGUMENT

A. The the "Massachusetts Rule", Ponte v. Desilva, 388 Mass. 1008 (1983), that holds that the failure of a landowner to prevent the blowing or dropping of leaves, branches, and sap from a healthy tree onto a neighbor's property is not unreasonable and cannot be the basis of a finding of negligence or private nuisance, should be overturned in light of developments in case law across the country where courts in other states have explicitly rejected the Massachusetts rule as outdated, unrealistic and unfair.

In Shiel's Complaint, a cause of action for both trespass and private nuisance were alleged. (App. 5). A trespasser is defined as one "who enters or remains upon land in the possession of another without a privilege to do so"), Gage v. Westfield, 26 Mass. App. Ct. 681 , 695 n.8 (1988) , quoting from Restatement (Second) of Torts § 329 (1965); id. at § 158 ("One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally [a] enters land in the possession of the other, or causes a thing or a third person to do so, or [b] remains on the land, or [c] fails to remove from

the land a thing which he is under a duty to remove"). (App.5).

A private nuisance occurs when there is an invasion of another's interest in the private use and enjoyment of land and the invasion is:

> Sec. 822.
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities:
>
> 824. Type Of Conduct Essential To Liability
>
> The conduct necessary to make the actor liable for either a public or a private nuisance may consist of
>
> (a) an act; or
>
> (b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest or the invasion of the private interest.
> See: Restatement (Second) of Torts (1979), Division 10. Invasions of Interests In Land Other Than by Trespass, Chapter 40 Nuisances, Topic 2. Private Nuisances; Elements Of Liability (Select Provisions);

The Rowells, in their Motion to Dismiss, relied on Pontes v. DaSilva, 388 Mass. 1008 (1983) as the basis for denying relief to Shiel. (App.17) In Pontes v Dasilva, the Supreme Judicial Court indicated that:

"No case has been brought to our attention in which liability has been imposed in such circumstances."; (Pontes @ 1009)

But as the Appellate Division observed in a different case just three years ago:

> "The essence of a private nuisance action is some interference with the use and enjoyment of property. PROSSER& KEETON, TORTS §87, at 619 (5th ed. 1984). See Connerty v. Metropolitan Dist. Commn., 398 Mass. 140 , 147 (1986). A private nuisance is actionable when a property owner creates, permits, or maintains a condition or activity on his property that causes a substantial and unreasonable interference with the use and enjoyment of the property of another. See Morash & Sons, Inc. v. Commonwealth, 363 Mass. 612 , 616 (1973). Leary v. Boston, 20 Mass. App. Ct. 605 , 609 (1985)." Asiala v. City of Fitchburg, 24 Mass. App. Ct. 13 , 16-17 (1987).
> Kimberly Smith vs. Eric Wright 2013 Mass. App. Div. 24 March 6, 2013;

In the decision allowing the motion to dismiss the District Court did not affirm the ruling in Pontes or reject the reasoning of any of the other courts across the country that have explicitly rejected the Massachusetts Rule. Rather the premise of the ruling was that lower courts cannot alter or change settled law; only the Supreme Judicial Court can do that.

Pontes was decided in 1983. Since that time, a number of courts in other states have imposed liability

in these very same circumstances and in doing so have specifically considered and rejected the "Massachusetts Rule." See for example Fancher v. Fagella, 274 VA. 549, 650 S.E.2d 519 (2007).

Fancher was a Virginia case. In its decision the Court changed the "Virginia rule" and imposed " ... a limited duty on owners of adjoining residential lots to protect against actual or imminent injury to property caused by intruding branches and roots." 274 VA. at 555-56, 650 S.E.2d at 522;

Also see: Richard Herring of Herring Chiropractic Clinic v. Lisbon Partners Credit Fund, Ltd. Partnership and Five Star Services, 2012 ND 226 (ND Sup. Ct. 2012) where the "Massachusetts Rule" was considered and rejected:

> Under the "Massachusetts rule," first announced in Michalson v. Nutting, 175 N.E. 490 (Mass. 1931), a landowner has no liability to neighboring landowners for damagescaused by encroachment of branches or roots from his trees, and the neighboring landowner's sole remedy is self-help: The injured neighbor may cut the intruding branches or roots back to the property line at his own expense. See, e.g., id. at 490-91; Lane v. W.J. Curry & Sons, 92 S.W.3d 355, 360-61 (Tenn. 2002); Fancher v. Fagella,650 S.E.2d 519, 521 (Va. 2007). The basis for the Massachusetts rule was explained in Michalson, at 491
>
> The Massachusetts rule, however, has been

> criticized as being outdated, having evolved in an earlier time when land was mostly unsettled and people lived predominately in rural settings. The Massachusetts rule has also been criticized as fostering a "law of the jungle" mentality because self-help effectively replaces the law of orderly judicial process as the only way to adjust the rights and responsibilities of disputing neighbors. As one court has observed, "in the long run neighborhood quarrels and petty litigation will be minimized rather than magnified by a rule that does not require an exercise of self-help before permitting an action to enforce legal rights." Ludwig v. Creswald, Inc., 7 Pa. D. & C.2d 461, 464 (1956). Finally, some courts have questioned whether the Massachusetts rule is fair given that it deprives deserving plaintiffs of any meaningful redress when their property is damaged. A strict application of the Massachusetts rule to the present case, for example, would leave the plaintiff with no remedy for the hole in her roof or for being unable to use the only bathroom in her house for two years.
>
> The common sense of the common law has recognized that it is wiser to leave the individual to protect himself, if harm results to him from this exercise of another's right to use his property in a reasonable way, than to subject that other to the annoyance, and the public to the burden, of actions at law, which would be likely to be innumerable and, in many instances, purely vexatious.

The "Hawaii rule," was formulated in Whitesell v. Houlton, 632 P.2d 1077 (HAW. Ct.App. 1981). The court in Whitesell criticized the Massachusetts rule, stating that although it was "simple and certain," it was not always "realistic and fair," and held that the owner of a tree may be held liable when encroaching branches

cause harm, or create imminent danger of causing harm:

> We hold that ... overhanging branches or protruding roots constitute a nuisance only when they actually cause, or there is imminent danger of them causing, sensible harm to property other than plant life, in ways other than by casting shade or dropping leaves, flowers, or fruit; that when overhanging branches or protruding roots actually cause, or there is imminent danger of them causing, sensible harm to property other than plant life, in ways other than by casting shade or dropping leaves, flowers, or fruit ... "

In Herring, North Dakota rejected the Massachusetts rule and indicated it would follow the Hawaii rule:

> We adopt the rule stated in Whitesell v. Houlton. This approach voices a rational and fair solution, permitting a landowner to grow and nurture trees and other plants on his land, balanced against the correlative duty of a landowner to ensure that the use of his property does not materially harm his neighbor. The privilege of a landowner to make use of his property as he sees fit is generally qualified by the requirement that he exercise due regard for the interests of those who may be affected by the landowner's activities on the property. It is the duty of a landowner to utilize his property in a reasonable manner so as not to cause injury to adjoining property.
>
> " ...the Hawaii rule is the most well-reasoned, fair, and practical of the four generally recognized rules. We first note that the Restatement and Virginia rules have each been adopted in very few jurisdictions, and have been widely criticized as being based upon arbitrary distinctions which are unworkable, vague, and difficult to apply. See, e.g., Melnick v. C.S.X. Corp., 540 A.2d 1133, 1136-38 (Md. 1988); Lane, 92

> S.W.3d at 361-62. In fact, the Supreme Court of Virginia has overruled Smith and abandoned the Virginia rule in favor of the Hawaii rule. Fancher, 650 S.E.2d at 522. The Massachusetts rule has also been widely criticized as being "unsuited to modern urban and suburban life." Fancher, 650 S.E.2d at 522. As the court summarized in Lane, 92 S.W.3d at 361 (citations and footnote omitted):
> Herring, supra.

That court also addressed the "self help" argument that is used to justify the Massachusetts rule:

> We add our concern that the Massachusetts rule and its limited remedy provide little aid to a neighboring landowner who has suffered significant damage from intruding branches or roots. While self-help may be sufficient when a few branches have crossed the property line and can be easily pruned by the neighboring landowner himself, it is a woefully inadequate remedy when overhanging branches break windows, damage siding, or knock holes in a roof, or when invading roots clog sewer systems, damage retaining walls, or crumble a home's foundation. Even the mere expense of having large trees trimmed by a professional, as was required in this case, is a significant burden to place on the innocent neighboring landowner when his neighbor's trees are allowed to encroach upon his property unabated.
> Herring, supra.

That court struck a balance between the obligation to prune tree branches that protrude into a neighbor's property and the absence of any obligation to stop leaves, sap etc., from blowing into or dropping in a neighbor's yard, finding that a duty did exist when the branches were dangerous:

> While we recognize a landowner's right to generally use his property as he sees fit, including planting and maintaining trees and vegetation, we agree with those courts which have held that right comes with a corresponding duty to maintain those trees and vegetation in a manner which does not unreasonably interfere with the rights of adjoining landowners. We agree with the rationale of the court in Abbinett v. Fox, 703 P.2d 177, 181 (N.M. Ct. App. 1985) (citations omitted):
> Herring, supra.
>
> Although a landowner is entitled to use his own property, consistent with the law, in a manner calculated to maximize his own enjoyment, a concomitant of this right is that the use and enjoyment of his estate may not unreasonably interfere with or disturb the rights of adjoining landholders, or create a private nuisance.
> Herring, supra.

North Dakota was not alone. That court cited decisions in courts in other states that considered the issue since the Supreme Judicial Court issued its Pontes decision in 1983 and agreed with them:

> We also agree with the comprehensive and well-reasoned rationale expressed by the Supreme Court of Tennessee when it adopted the Hawaii rule.
> Herring, supra.
> See: Lane v. W.J. Curry & Sons, 92 S.W.3d 355, 360-61 (Tenn. 2002)
>
> Also see: See Chandler v. Larson, 500 N.E.2d 584, 587 (Ill. Ct. App. 1986):
>
> "The traditional rule of non-liability [the Massachusetts rule] developed at a time when land was mostly unsettled and uncultivated. The landowner, unable to keep a daily account of and

> remedy all of the dangerous conditions arising out of purely natural causes, was therefore shielded from liability out of necessity. While there are many reasons to continue the traditional rule in regions that are largely rural, there is little or no reason to apply it in urban and other developed areas. In urban centers it would not be unduly burdensome for a small property owner to inspect his property and to take reasonable precautions against dangerous natural conditions." Chandler, 500 N.E.2d at 587 (citations omitted)

> See also: Abbinett v. Fox 103 N.M. 80 703 P.2d 177 (1985):

> We adopt the rule stated in Whitesell v. Houlton. This approach voices a rational and fair solution, permitting a landowner to grow and nurture trees and other plants on his land, balanced against the correlative duty of a landowner to ensure that the use of his property does not materially harm his neighbor. The privilege of a landowner to make use of his property as he sees fit is generally qualified by the requirement that he exercise due regard for the interests of those who may be affected by the landowner's activities on the property. Scott v. Jordan, 99 N.M. 567, 661 P.2d 59 (Ct.App. 1983); Jellison v. Gleason, 77 N.M. 445, 423 P.2d 876 (1967).

As the North Dakota Supreme Court observed, the Hawaiian rule was more suited to modern life than the outmoded Massachusetts rule:

> After carefully considering the various approaches of other jurisdictions and our own decision in Granberry v. Jones, 216 S.W.2d 721 (Tenn. 1949)], we have decided to join the growing number of states that have adopted the Hawaii approach. We do so for several reasons. First, the Hawaii approach strikes an appropriate balance between the competing rights of adjacent property owners.

As stated by one court, "[t]his approach voices a rational and fair solution, permitting a landowner to grow and nurture trees and other plants on his land, balanced against the correlative duty of a landowner to ensure that the use of his property does not materially harm his neighbor." Abbinett, 703 P.2d at 181. We agree that since the "owner of the tree's trunk is the owner of the tree, he [should] bear some responsibility for the rest of the tree." Whitesell, 632 P.2d at 1079.

Second, we are persuaded that the Hawaii approach is stringent enough to discourage trivial suits, but not so restrictive that it precludes a recovery where one is warranted. Although some courts express the concern of spawning numerous lawsuits, we note that states which do not limit a plaintiff's remedy to self-help have apparently not suffered any such flood of litigation. Imposing a requirement of actual harm or imminent danger of actual harm to the adjoining property is a sufficient and appropriate gatekeeping mechanism. Third, we agree with the notion that limiting a plaintiff's remedy to self-help encourages a "law of the jungle" mentality because self-help replaces the law of orderly judicial process as the exclusive way to adjust the rights and responsibilities of disputing neighbors. It seems that more harm than good can come from a rule that encourages angry neighbors to take matters into their own hands.
Fourth, the Hawaii rule does not depend upon difficult to apply or unworkable distinctions, a major disadvantage of the Restatement and Virginia approaches. We do not wish to place our courts in the difficult, and sometimes impossible, position of having to ascertain the origin of a particular tree or other vegetation. Nor should landowners who allow their property to run wild be shielded from liability while those who maintain and improve their land be subject to liability. The law should not sanction such an anomaly. Fifth, the Hawaii approach is consistent with the principle of self-help embraced in Granberry. The rule is also consistent with Granberry's

> recognition that a landowner may recover the "expense to which he may be put now or hereafter in cutting the overhanging branches or foliage," assuming the encroaching vegetation constitutes a nuisance. Granberry, 216 S.W.2d at 723. Finally, the rule we adopt today is in keeping with the aim of the law to provide a remedy to those who are harmed as a result of another's tortuous conduct. Lane, 92 S.W.3d at 363-64.
>
> Accordingly, we hold that ... encroaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger of actual harm to adjoining property. If so, the owner of the tree or plant may be held responsible for harm caused by it ..."
> Herring, 2012 ND 226 (ND Sup. Ct. 2012).

Pontes was decided in 1983, the court stating that "No case has been brought to our attention in which liability has been imposed in such circumstances." Since then the above courts in other states have imposed liability in these circumstances and in doing so have specifically considered and rejected the "Massachusetts Rule."

The Pontes decision was preceded by the Hawaiian decision in Whitesell v. Houlton, 632 P.2d 1077 (HAW. Ct. App. 1981).

New Mexico rejected the Massachusetts rule: Abbinett v. Fox 103 N.M. 80 703 P.2d 177 (1985).

Then, Illinois rejected the Massachusetts rule: Chandler v. Larson, 500 N.E.2d 584, 587 (Ill. Ct.

App. 1986).

Tennessee followed: Lane v. W.J. Curry & Sons, 92 S.W.3d 355, 360-61 (Tenn. 2002).

Virginia came next: Fancher v. Fagella, 274 VA. 549, 650 S.E.2d 519 (2007).

Then, North Dakota: Richard Herring of Herring Chiropractic Clinic v. Lisbon Partners Credit Fund, Ltd. Partnership and Five Star Services 2012 ND 226.

Almost everyone of the above decisions examined and explicitly rejected the Massachusetts rule.

The Massachusetts rule is:

1. Out dated;
2. Evolved in an earlier time when land was mostly unsettled and people lived predominately in rural settings;
3. Fosters a "law of the jungle" mentality because self-help effectively replaces the law of orderly judicial process as the only way to adjust the rights and responsibilities of disputing neighbors;
4. As one court has observed, "in the long run neighborhood quarrels and petty litigation will be minimized rather than magnified by a rule that does not require an exercise of self-help before permitting an action to enforce legal rights." Ludwig v. Creswald, Inc., 7 Pa. D. & C.2d 461, 464 (1956); and;
5. The Massachusetts rule deprives deserving Plaintiffs of any meaningful redress when their property is damaged.

## CONCLUSION

Appellant requests that the court vacate the Court's November 22, 2016 Judgment of Dismissal, overturn the "Massachusetts Rule", regarding private nuisance, and remand the matter to the District Court for further proceedings consistent with the Court's decision that overhanging tree branches can constitute an actionable private nuisance.

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CERTIFICATION UNDER RULE 16 OF MASS. R.A.P.

I, William F. Spallina, counsel for Appellant, Mary Shiel, hereby certify that the Appellant's brief submitted herewith complies with the Rules of Court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6); (pertinent findings or memoranda of decision); Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P. 16 (f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of brief); Mass. R.A.P. 18 (appendix to brief); and Mass. R.A.P. 20 (form of briefs, appendices and other papers).

I further attest, that this brief is being filed under Rule 13(a), and that the day of mailing is within the time fixed by the court.

William F. Spallina 473980

October 26, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the above document was served upon Defendants/Appellees attorney of record:

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October 26, 2017